



# Specialized Proceedings Before Immigration Judges

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# Credible Fear Review

- **Sources of authority:**
- 
- 8 U.S.C. § 235(b)(1)(B)(iii)(II).
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- 8 C.F.R. §§ 208.30, 1003.42, 1208.30(g) (2015).
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- Immigration Court Practice Manual (ICPM) ¶ 7.4(d)(iv).

## Credible Fear Review (continued)

- Interim Operating Policy and Procedure Memorandum (OPPM) 97-3: *Procedures for Credible Fear and Claimed Status Reviews.*
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- Note that neither the OPPM nor the ICPM were published pursuant to the rulemaking provisions of the Administrative Procedures Act.
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- - The BIA has nevertheless suggested that the ICPM is authoritative. *See Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265 (BIA 2010).

# Credible Fear Review (continued)

- Applicability:
- • Applicants for admission found inadmissible by DHS and aliens subject to expedited removal pursuant to INA §§ 235(b)(1) and 235(a)(2), respectively. 8 C.F.R. § 208.30(a).
- • DHS Asylum Officer found no credible fear of persecution or torture.
- - Not a “*significant possibility*, taking into account the credibility of the statements made by alien of the alien’s claim and such other facts as are known to the officer, the alien can establish eligibility for asylum . . or for withholding of removal.” 8 C.F.R. § 208.30(e)(2) (emphasis added); DHS *Lafferty Memo*, Feb 28, 2014.
- • Alien requested Immigration Judge review (or refused to make an election). 8 C.F.R. § 208.30(g)(1).

# Credible Fear Review (continued)

- Initiation of Proceedings:
  - Initiated by filing a *Notice of Referral to Immigration Judge*, Form I-863, with the administrative “written record:”
  - - the report of Asylum Officer’s interview including a summary of the material facts as stated by the applicant and the Officer’s analysis,
  - - additional facts and other materials (if any) relied upon by the Asylum Officer,
  - - the Officer’s interview notes, and
  - - the *Notice and Order of Expedited Removal*, Form I-860.
  -
- 8 U.S.C. § 235(b)(1)(B)(iii)(II); 8 C.F.R. §§ 1003.42(a), 1208.30(g)(2)(ii); OPPM 97-3, p. 6.

# Credible Fear Review (continued)

- Proceedings:
  - 8 C.F.R. § 1003.12, *et seq* Immigration Court procedures are specifically inapplicable: "The sole procedures for review of credible fear determinations by IJs are provided for in 1003.42." 8 C.F.R. § 1003.12.
  - 
  - IJ "shall determine whether the review shall be in person, or through telephonic or video connection." 8 C.F.R. § 1003.42(c).
  - 
  - Closed to the public unless the alien consents on the record or in writing. 8 C.F.R. § 1208.30(g)(2)(iii).
  - 
  - Hearing is recorded. ICPM ¶ 7.4(d)(iv)(E).
  - 
  - "A credible fear review is simply a review of the DHS asylum officer's decision." ICPM ¶ 7.4(d)(iv)(E). "Credible fear review proceedings should not be as in depth as a full asylum hearing." OPPM 97-3, p. 9.

# Credible Fear Review (continued)

- Representation:
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- DHS representation – regulation is silent.
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- Alien representation: “Alien may consult with a person or persons of the alien’s choosing prior to review.” 8 C.F.R. § 1003.42(c).
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- - “In the discretion of the IJ, persons consulted may be present during the credible fear review. However, the alien is not represented at the credible fear review. Accordingly, persons acting on the alien’s behalf are not entitled to make opening statements, call and question witnesses, conduct cross examinations, object to evidence, or make closing arguments.” ICPM ¶ 7.4(d)(iv)(C).

# Credible Fear Review (continued)

- Standard of review:
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- 8 C.F.R. § 1003.42(d)
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- • *De novo* – Immigration Judge is not bound by determination of Asylum Officer.
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- Considering credibility of alien's statements in support of claim.
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- Is there a “*significant possibility*” that the alien could establish eligibility for asylum or withholding? 8 C.F.R. § 1003.42(d) (emphasis added)
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- - “Lower than the “well-founded fear” standard needed to receive asylum [and] intended to separate meritorious claims from clearly non-meritorious claims.” H.R. Rep. 104-879, 107 (Jan. 2, 1997).

# Credible Fear Review (continued)

- Evidence:
  - The administrative “written record” from DHS. 8 U.S.C. § 235(b)(1)(B)(iii)(II); 8 C.F.R. §§ 1003.42(a), 1208.30(g)(2)(ii); OPPM 97-3, p. 6.
  - 
  - Additionally, the Immigration Judge “*may receive*” any oral or written statement that is material and relevant to an issue in the review. 8 C.F.R. § 1003.42(c) (emphasis added).
  - 
  - - Receipt of evidence is in the discretion of the Immigration Judge. ICPM ¶ 7.4(d)(iv)(E).
  - 
  - Testimony of the alien shall be under oath or affirmation administered by the Immigration Judge. 8 C.F.R. § 1003.42(c).
  - 
  - The immigration judge takes “into account the credibility of the statements made by the alien in support of the alien’s claim and such other facts as are known to the immigration judge.” 8 C.F.R. § 1003.42(d).

# Credible Fear Review (continued)

## Decision:

- If the Immigration Judge finds credible fear, vacate Asylum Officer's determination – DHS files Notice to Appear. 8 C.F.R. § 1208.30(g)(2)(iv)(B).
- If the Immigration Judge finds no credible fear, affirm Asylum Officer's determination & remand to DHS for execution of administrative removal order. 8 C.F.R. § 1208.30(g)(2)(iv)(A).
- There is no right to appeal the Immigration Judge's decision to the BIA – it is administratively final. *Id.*

# Reasonable Fear Review Proceedings

- **Sources of authority:**
- 
- Not mentioned in the INA
- 
- 8 C.F.R. §§ 208.31, 1208.31.
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- Immigration Court Practice Manual (ICPM) ¶ 7.4(e)(iv).

# Reasonable Fear Review Proceedings (continued)

- Applicability:

- Aliens administratively ordered removed pursuant to INA § 238(b) (non-LPR aggravated felons) or whose prior order is being reinstated pursuant to INA § 241(a)(5). 8 C.F.R. § 208.31(a); 1208.31(a).
- DHS found no reasonable fear of persecution or torture.
- - Not a “*reasonable possibility* that he or she would be persecuted . . . or tortured in the country of removal.” 8 C.F.R. §§ 208.31(c), 1208.31(c).
- Alien requested Immigration Judge review. 8 C.F.R. §§ 208.31(f), 1208.31(f).

# Reasonable Fear Review Proceedings (continued)

- **Initiation of Proceedings:**
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- • Initiated by filing a *Notice of Referral to Immigration Judge*, Form I-863, with the administrative “record of determination:”
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- - the report of Asylum Officer’s interview, including a summary of the material facts,
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- - other materials upon which the determination was based, and
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- - the Officer’s notes.
- • 8 C.F.R. § 1208.31(g); ICPM ¶ 7.4(e)(iv)(D).

# Reasonable Fear Review Proceedings (continued)

- Proceedings:

- Unlike Credible Fear Reviews, 8 C.F.R. § 1208.31 provides no special procedural rules for Reasonable Fear Reviews.
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- “Except where specifically stated, the rules in this subpart apply to matters before Immigration Judges, including, but not limited to . . . .” 8 C.F.R. Part 1003, Subpart C, Immigration Court – Rules of Procedures, 8 C.F.R. § 1003.12.
- 
- - In short, in the absence of other specifically applicable procedural rules, the same rules of procedure applicable to INA § 240 removal proceedings apply to Reasonable Fear Reviews (e.g.; representation (§ 1003.16), appearances (§ 1003.17), and continuances (§ 1003.29)).
- 
- The hearing is recorded. ICPM ¶ 7.4(e)(iv)(E).
- 
- “A reasonable fear review hearing is not as comprehensive or in-depth as a withholding of removal hearing in removal proceedings. Rather, it is a review of the DHS asylum officer’s decision.” – ICPM ¶ 7.4(e)(iv)(E).

# Reasonable Fear Review Proceedings (continued)

- **Representation:**

- DHS may be represented. 8 C.F.R. § 1003.16(a).
- Alien may be represented by an attorney or other representative at no expense to the government. 8 C.F.R. § 1003.16(b).
- - Note that ICPM ¶ 7.4(e)(iv)(C) provides that alien representation is "subject to the immigration judge's discretion."

# Reasonable Fear Review Proceedings (continued)

- Standard of review:
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- Does the alien have a “reasonable fear” of persecution or torture? 8 C.F.R. § 1208.31(g).
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- - “The “reasonable fear” screening standard is the same standard of proof used before the asylum officer. That is, the alien must show that there is a “*reasonable possibility*” that he or she would be persecuted or tortured in the country of removal.” 64 Fed. Reg. 8485 (emphasis added).
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- - Higher than the “significant possibility” standard applicable to credible fear review, reflecting the “significantly higher” “likelihood” standard of proof for withholding of removal applications as compared to the “well-founded fear” standard for asylum. *Id.*
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- - The bars to Withholding of Removal are not considered. ICPM ¶ 7.4(e)(i).

# Reasonable Fear Review Proceedings (continued)

- Evidence:
- The administrative “record of determination” from DHS. 8 C.F.R. § 1208.31(g).
- Other “evidence may be introduced at the discretion of the Immigration Judge.” ICPM ¶ 7.4(e)(iv)(E).
- - Note that 8 C.F.R. § 1208.31 is silent regarding the submission of evidence beyond the administrative “record of determination.”
- Testimony of witnesses to be under oath or affirmation. 8 C.F.R. § 1003.34.

# Reasonable Fear Review Proceedings (continued)

- **Decision and Appeal:**

- If the Immigration Judge finds no reasonable fear, return to DHS for execution of administrative removal order. 8 C.F.R. § 1208.31(g)(1).
- - Provide a brief rationale for your concurrence with the Asylum Officer on the order, i.e.; “no protected ground / no government nexus.”
- - No right to appeal the Immigration Judge’s reasonable fear decision to the BIA – it is administratively final. 8 C.F.R. § 1208.31(g)(1)(iv)(A).

# Reasonable Fear Review Proceedings (continued)

- If the Immigration Judge finds reasonable fear, the alien may apply for Withholding of Removal (the alien is ineligible for Asylum). 8 C.F.R. § 1208.31(g)(2).
  - INA § 241(b)(3) and 8 C.F.R. § 1208.16(d)(2) grounds for mandatory denial apply.
- The Applicant has the right to appeal an adverse decision on an application for Withholding of Removal to the BIA. 8 C.F.R. § 1208.31(g)(2)(ii).
- There is no right to appeal the Immigration Judge's decision to the BIA – the decision is administratively final. *Id.*
  - However, at least one Circuit Court of Appeal is accepting Petitions for Review and finding jurisdiction to review an IJ's adverse reasonable fear review. *See, e.g.; Marisol-Ayala v. Sessions*, No. 13-72250 (9<sup>th</sup> Cir. 2017) (IJ abused his discretion in finding no reasonable fear where a protected ground – membership in a particular social group; "family ties" – was "a reason" for extortion); *Andrade-Garcia v. Lynch*, 820 F.3d 1076 (9<sup>th</sup> Cir. 2016) (IJ's negative reasonable fear finding supported by "substantial evidence").

# Withholding-Only Proceedings

- Sources of authority:
- 
- INA §§ 241(b)(3).
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- 8 C.F.R. §§ 1208.2(c)(2); 1208.3; 1208.31(g)(2).
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- Immigration Court Practice Manual (ICPM) ¶ 7.4(h).

# Withholding-Only Proceedings (continued)

- Applicability:
  - Aliens subject to a reinstated removal order pursuant to INA § 241(a)(5) where an Asylum Officer or Immigration Judge has found a reasonable fear of persecution or torture. 8 C.F.R. §§ 1208.2(c)(2)(i); 1208.31(g)(2).
  - Aliens administratively ordered removed pursuant to INA § 238 for having been convicted of an aggravated felony, and where an Asylum Officer has found a reasonable fear of persecution or torture. 8 C.F.R. § 1208.2(c)(2)(ii).

# Withholding-Only Proceedings (continued)

- **Initiation of Proceedings:**
- Initiated by filing a *Notice of Referral to Immigration Judge*, Form I-863.
- 8 C.F.R. § 1208.2(c)(2).

# Withholding-Only Proceedings (continued)

- Proceedings:
- “The scope of review . . . shall be limited to a determination of whether the alien is eligible for *withholding* or *deferral* of removal.” 8 C.F.R. § 1208.2(c)(3)(i) (emphasis added).
- Withholding-only proceedings are “conducted in accordance with the same rules of procedure as proceedings conducted under 8 C.F.R. part 1240, subpart A,” except that “all parties are prohibited from raising or considering any other issues, including but not limited to issues of admissibility, deportability, eligibility for waivers, and eligibility for any other form of relief.” 8 C.F.R. § 1208.2(c)(3)(i).

# Withholding-Only Proceedings (continued)

- **Representation:**

- DHS may be represented. 8 C.F.R. § 1003.16(a).
- Alien may be represented by an attorney or other representative at no expense to the government. 8 C.F.R. § 1003.16(b).

# Withholding-Only Proceedings (continued)

- **Standard of review:**
  - The same burdens of proof regarding an application for withholding of removal applicable in removal proceedings apply. 8 C.F.R. §§ 1208.2(c)(3)(i); 1240.8(d).
- **Evidence:**
  - The same evidentiary rules applicable to removal proceedings apply. 8 C.F.R. §§ 1208.2(c)(3)(i); 1240.7.

# Withholding-Only Proceedings (continued)

- Decision and Appeal:
  - The parties have the same right to appeal as in removal proceedings. 8 C.F.R. §§ 1208.2(c)(3)(i); 1240.15.



- Questions?

# Specialized Proceedings: Part II

- Asylum-Only Proceedings
- Claimed Status Review Proceedings
- Rescission Proceedings
- Deportation and Exclusion Proceedings

# Asylum-Only Proceedings

- Sources of authority:
- 
- INA §§ 208, 241(b)(3).
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- 8 C.F.R. §§ 1208.2(c)(1); 1208.5(b)(1)(ii); 1208.30(g)(2)(iv)(C); 1235.8.
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- Immigration Court Practice Manual (ICPM) ¶ 7.4(g).

# Asylum-Only Proceedings (continued)

- Applicability:
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- Stowaways found to have a credible fear of persecution or torture by an immigration officer or Immigration Judge. 8 C.F.R. §§ 1208.2(c)(1)(ii); 1208.30(g)(2)(iv)(C).
- 
- Crewmembers (D Visa applicants) who express a fear of persecution or torture to an immigration officer. 8 C.F.R. §§ 1208.2(c)(1)(i), 1208.5(b)(1)(ii).
- 
- Visa Waiver Program (VWP) applicants for admission and overstays who have expressed a fear of persecution or torture to an immigration officer, or who apply for asylum with DHS. 8 C.F.R. §§ 1208.2(c)(1)(iii); 1208.2(c)(1)(iv).

# Asylum-Only Proceedings (continued)

- Applicability (continued):
  - Aliens who have applied for or have been admitted with an S Visa who have expressed a fear of persecution or torture to an immigration officer, or who applies for asylum with DHS. 8 C.F.R. § 1208.2(c)(1)(iv).
  - Aliens administratively ordered removed by DHS pursuant to INA § 235(c)(1) on security and related grounds, and referred to an Immigration Judge by the DHS regional director. 8 C.F.R. §§ 1208.2(c)(1)(v), 1235.8.

# Asylum-Only Proceedings (continued)

- **Initiation of Proceedings:**
- Initiated by filing a *Notice of Referral to Immigration Judge*, Form I-863.
- 8 C.F.R. § 1208.2(c)(1).

# Asylum-Only Proceedings (continued)

- Proceedings:
- “The scope of review . . . shall be limited to a determination of whether the alien is eligible for *asylum* or *withholding* or *deferral* of removal, and whether asylum shall be granted in the exercise of discretion.” 8 C.F.R. § 1208.2(c)(3)(i) (emphasis added).
- Asylum-only proceedings are “conducted in accordance with the same rules of procedure as proceedings conducted under 8 C.F.R. part 1240, subpart A,” except that “all parties are prohibited from raising or considering any other issues, including but not limited to issues of admissibility, deportability, eligibility for waivers, and eligibility for any other form of relief.” 8 C.F.R. § 1208.2(c)(3)(i).

# Asylum-Only Proceedings (continued)

- Representation:
- DHS may be represented. 8 C.F.R. § 1003.16(a).
- Alien may be represented by an attorney or other representative at no expense to the government. 8 C.F.R. § 1003.16(b).

## Asylum-Only Proceedings (continued)

- **Standard of review:**
  - The same burdens of proof regarding applications for asylum or withholding of removal applicable in removal proceedings apply. 8 C.F.R. §§ 1208.2(c)(3)(i); 1240.8(d).
- **Evidence:**
  - The same evidentiary rules applicable to removal proceedings apply. 8 C.F.R. §§ 1208.2(c)(3)(i); 1240.7.

# Asylum-Only Proceedings (continued)

- **Decision and Appeal:**
- The parties have the same right to appeal as in removal proceedings. 8 C.F.R. §§ 1208.2(c)(3)(i); 1240.15.

# Claimed Status Review Proceedings

- Sources of authority:
  - INA § 235(b)(1)(C).
  - 8 C.F.R. § 1235.3(b)(5)(iv).
  - Interim Operating Policy and Procedure Memorandum (OPPM) 97-3: *Procedures for Credible Fear and Claimed Status Reviews*.
  - Immigration Court Practice Manual (ICPM) ¶ 7.4(f).

# Claimed Status Review Proceedings (continued)

- Applicability:
  - Aliens found inadmissible by DHS and administratively ordered removed (expedited removal) pursuant to INA § 235(b)(1)(A)(i) who claims to be a United States citizen, to have been lawfully admitted for permanent residence, to have been admitted as a refugee, or to have been granted asylum.
  - The DHS has been unable to verify the claimed status.
  - Alien makes declaration in a written statement under oath under penalty of perjury.
  - INA § 235(b)(1)(C); 8 C.F.R. § 1235.3(b)(5)(i); OPPM 97-3, p. 4; ICPM ¶ 7.4(f).

# Claimed Status Review Proceedings (continued)

- Initiation of Proceedings:
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- Initiated by filing a *Notice of Referral to Immigration Judge*, Form I-863, with the alien's sworn statement claiming status as a United States citizen, to having been lawfully admitted as a permanent resident or refugee, or to having been granted asylum.

# Claimed Status Review Proceedings (continued)

- Proceedings:

- Unlike Credible Fear Reviews, 8 C.F.R. § 1235.3 provides no special procedural rules for Claimed Status Reviews.
- “Except where specifically stated, the rules in this subpart apply to matters before Immigration Judges, including, but not limited to . . . .” 8 C.F.R. Part 1003, Subpart C, Immigration Court – Rules of Procedures, 8 C.F.R. § 1003.12.
- - In short, in the absence of other specifically applicable procedural rules, the same rules of procedures applicable to INA § 240 removal proceedings apply to Claimed Status Reviews (e.g.; representation (§ 1003.16), appearances (§ 1003.17), and continuances (§ 1003.29)).

# Claimed Status Review Proceedings (continued)

- Proceedings (continued):
  - The hearing is recorded. ICPM ¶ 7.4(f)(v).
  - 
  - “Though the claimed status review is limited in nature, claims to status, particularly claims to United States citizenship, can be complicated and may require extensive evidence. Therefore, the Immigration Judge has the discretion to continue proceedings to allow DHS and the person making the claim to collect and submit evidence.” ICPM ¶ 7.4(f)(v).

# Claimed Status Review Proceedings (continued)

- Representation:
- 
- 
- DHS may be represented. 8 C.F.R. § 1003.16(a).
- 
- Alien may be represented by an attorney or other representative at no expense to the government. 8 C.F.R. § 1003.16(b).
- 
- - Note that ICPM ¶ 7.4(f)(iii) provides that the alien “may consult with a person or persons of his or her choosing,” and that “in the discretion of the Immigration Judge” the “persons consulted may be present during the claimed status review;” however, “the individual subject to the review is not represented during the review” and the person consulted is “not entitled to make opening statements, call and question witnesses, conduct cross examinations, object to evidence, or make closing arguments.”

# Claimed Status Review Proceedings (continued)

- **Standard of review:**
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- - The immigration judge “determines” whether the alien has the claimed status. 8 C.F.R. § 1235.3(b)(5)(iv).
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- - Neither the statute, the regulation, nor the Practice Manual offer any standard of proof.

# Claimed Status Review Proceedings (continued)

- **Evidence:**
- “Either party may introduce oral or written statements.” ICPM ¶ 7.4(f)(v).
- Other evidence may be submitted in the discretion of the Immigration Judge. ICPM ¶ 7.4(f)(v).

# Claimed Status Review Proceedings (continued)

- **Decision and Appeal:**
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- - If the claimed status is not verified, “the order issued by the immigration officer will be affirmed and the [DHS] will remove the alien.” 8 C.F.R. § 1235.3(b)(5)(iv).
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- - If the claimed status is verified, “the Immigration Judge will terminate proceedings and vacate the expedited removal order.” 8 C.F.R. § 1235.3(b)(5)(iv).
- 
- - Note that the Order in CASE is that “the decision of the immigration officer is vacated.”
- 
- - The DHS may thereafter place the alien (but not a verified United States citizen) in removal proceedings. 8 C.F.R. § 1235.3(b)(5)(iv).
- 
- - There is no right to appeal the Immigration Judge’s decision (at least not to the BIA). 8 C.F.R. § 1235.3(b)(5)(iv).

# Rescission Proceedings

- Sources of authority:
  - INA §§ 246(a).
  - 8 C.F.R. §§ 1246.1.
  - Immigration Court Practice Manual (ICPM) ¶ 7.3.

# Rescission Proceedings (continued)

- **Applicability:**
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- Aliens who have adjusted status as a lawful permanent resident within the past 5 years, who have subsequently been determined by DHS to not have been eligible for the adjustment of status, and who contest any allegation in the *Notice of Intent to Rescind* or requests a hearing before an Immigration Judge. 8 C.F.R. § 1246.1.

# Rescission Proceedings (continued)

- **Initiation of Proceedings:**
- Initiated by filing the *Notice of Intent to Rescind* and the respondent's *Answer* which either contests or denies any of the allegations, or requests a hearing before an Immigration Judge. 8 C.F.R. § 1246.1.
- The *Notice* and *Answer* are entered as exhibits in the record. 8 C.F.R. § 1246.5(b).

# Rescission Proceedings (continued)

- Proceedings:
- 
- 
- “The immigration judge shall have authority to interrogate, examine, and cross-examine the respondent and other witnesses, to present and receive evidence, to determine whether adjustment of status shall be rescinded, to make decisions thereon, including an appropriate order, and to take any other action consistent with applicable provisions of law and regulations as may be appropriate to the disposition of the case. Nothing contained in this part shall be construed to diminish the authority conferred on immigration judges by the Act.” 8 C.F.R. § 1246.4.
- 
- “The immigration judge shall advise the respondent of the nature of the proceeding and the legal authority under which it is conducted; . . . of his or her right to representation . . . ; that he or she will have a reasonable opportunity to examine and object to the evidence against him or her, to present evidence in his or her own behalf, and to cross-examine witnesses presented by the Government . . . .” 8 C.F.R. § 1246.5(b).

# Rescission Proceedings (continued)

- Proceedings (continued):
  - The immigration judge shall “read the allegations in the notice to the respondent and explain them in nontechnical language . . . .” *Id.*
  - “The immigration shall require the respondent to state for the record whether he or she admits or denies the allegations contained in the notice . . . and whether he or she concedes that his or her adjustment of status should be rescinded.” *Id.*
  - “If the respondent admits all of the allegations and concedes that the adjustment of status . . . should be rescinded . . . , and the immigration judge is satisfied that no issues of law or fact remain, he or she may determine that rescission as alleged has been established by the respondent’s admissions.” *Id.*
  - “The allegations contained in the notice shall be taken as admitted when the respondent, without reasonable cause, fails or refuses to attend or remain in attendance at the hearing.” *Id.*

# Rescission Proceedings (continued)

- **Representation:**
- DHS shall be represented. 8 C.F.R. § 1246.5(a).
- Alien may be represented by an attorney or other representative at no expense to the government. 8 C.F.R. §§ 1240.3; 1246.3; 1246.5(b).

# Rescission Proceedings (continued)

- **Standard of review:**
  - “In rescission of adjustment of status, the Government bears the burden of proving ineligibility for adjustment by clear, unequivocal, and convincing evidence.” *Matter of N-M-A-*, 22 I&N Dec. 312, 346 (BIA 1998) (Guendelsberger, J., concurring and dissenting), *citing Waziri v. INS*, 392 F.2d 55 (9th Cir. 1968); *Matter of Suleiman*, 15 I&N Dec. 784 (BIA 1974).
- **Evidence:**
  - Both parties have the right to present evidence, including witnesses. 8 C.F.R. §§ 1240.7; 1246.5(a) and (b).

# Rescission Proceedings (continued)

- Decision and Appeal:
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- “The decision of the immigration judge may be oral or written. . . . The order shall direct either that the proceeding be terminated or that the adjustment of status be rescinded.” 8 C.F.R. § 1246.6.
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- “The formal enumeration of findings is not required.” *Id.*
- 
- Both parties have the right to appeal the decision to the BIA. 8 C.F.R. § 1246.7.

# Deportation and Exclusion Proceedings

- Sources of authority:
- Former INA §§ 242B.
- 8 C.F.R. §§ 1240.40, *et seq.*
- Immigration Court Practice Manual (ICPM) ¶ 7.2

# Deportation and Exclusion (continued)

- Applicability:

- Deportation proceedings relate to aliens in the United States who have violated immigration law.
- Exclusion proceedings relate to aliens who arrive at a port of entry and are not admissible to the United States.
- Generally similar to, but beginning with proceedings commenced on April 1, 1997, have been replaced by removal proceedings. ICPM § 7.2(a).
  - However, immigration judges continue to conduct deportation and exclusion proceedings in certain cases that began before April 1, 1997.

# Deportation and Exclusion (continued)

- Initiation of Proceedings:
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- Deportation and Exclusion proceedings are initiated by the filing of an *Order to Show Cause* and a *Notice to Applicant for Admission Detained for Hearing*, respectively.
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- In Deportation proceedings, hearing notices must be either personally served on the alien or sent by certified mail, at least 14 days prior to the hearing.
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- - The *Order to Show Cause* or other notice (including any Form I-261, *Additional Charges of Inadmissibility/Deportability*) must be in English and Spanish. Former INA § 242B(a)(3)(A).

# Deportation and Exclusion (continued)

- Proceedings:
- The rules of procedure, representation, evidence, appeal, etc. are generally equivalent to those applicable to INA § 240 removal proceedings.
- Exclusion proceedings are closed to the public unless the alien requests that the public be allowed to attend.
- Grounds for deportability are found in former INA § 241.
- Grounds for excludability are found in former INA § 212.

# Deportation and Exclusion (continued)

- **Relief:**

- Eligibility for INA § 245 Adjustment of Status, INA § 208 Asylum, INA § 241(b)(3) Withholding of Removal, and relief under the Convention Against Torture are the same as in removal proceedings.
- Aliens in deportation proceedings may be eligible for Suspension of Deportation (similar to Cancellation of Removal in removal proceedings) pursuant to former INA § 244.
- Aliens lawfully admitted for permanent residence may be eligible for waiver pursuant to former INA § 212(c).



- Questions?

## SPECIALIZED PROCEEDINGS BEFORE IMMIGRATION JUDGES

New Immigration Judge Training, January, 2018

Richard A. Phelps  
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(desk) (b) (6)

<u>PROCEEDING</u>	<u>PAGE</u>
CREDIBLE FEAR REVIEW	2
REASONABLE FEAR REVIEW	5
WITHHOLDING-ONLY PROCEEDINGS	8
ASYLUM-ONLY PROCEEDINGS	10
CLAIMED STATUS REVIEW	12
RESCISSION PROCEEDINGS	15
DEPORTATION AND EXCLUSION PROCEEDINGS	18
APPENDIX	21
• SAMPLE SCRIPT – CREDIBLE FEAR/REASONABLE FEAR REVIEW PROCEEDINGS	
• EXAMPLE IJ ORDERS – CREDIBLE FEAR REVIEW, REASONABLE FEAR REVIEW, CLAIMED STATUS REVIEW	
• OPPM 97-3, <i>Procedures for Credible Fear and Claimed Status     Reviews</i>	

## CREDIBLE FEAR REVIEW

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### Sources of authority:

- 8 U.S.C. § 235(b)(1)(B)(iii)(II).
- 8 C.F.R. §§ 208.30, 1003.42, 1208.30(g) (2015).
- Immigration Court Practice Manual (ICPM) ¶ 7.4(d)(iv).
- Interim Operating Policy and Procedure Memorandum (OPPM) 97-3: *Procedures for Credible Fear and Claimed Status Reviews*.
- Note that neither the OPPM nor the ICPM were published pursuant to the rulemaking provisions of the Administrative Procedures Act.
  - The BIA has nevertheless suggested that the ICPM is authoritative. *See Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265 (BIA 2010).

### Applicability:

- Applicants for admission or stowaways found inadmissible by DHS and administratively ordered removed (expedited removal) pursuant to INA §§ 235(b)(1) and 235(a)(2), respectively. 8 C.F.R. § 208.30(a).
  - DHS Asylum Officer found no credible fear of persecution or torture.
    - Not a “*significant possibility*, taking into account the credibility of the statements made by alien of the alien’s claim and such other facts as are known to the officer, the alien can establish eligibility for asylum . . or for withholding of removal.” 8 C.F.R. § 208.30(e)(2) (emphasis added); DHS *Lafferty Memo*, Feb 28, 2014.
  - Alien requested Immigration Judge review (or refused to make an election). 8 C.F.R. § 208.30(g)(1).

### Initiation of Proceedings:

- Initiated by filing a *Notice of Referral to Immigration Judge*, Form I-863, with the administrative “written record:”
  - the report of Asylum Officer’s interview including a summary of the material facts as stated by the applicant and the Officer’s analysis,

- additional facts and other materials (if any) relied upon by the Asylum Officer,

- the Officer's interview notes, and

- the *Notice and Order of Expedited Removal*, Form I-860.

• 8 U.S.C. § 235(b)(1)(B)(iii)(II); 8 C.F.R. §§ 1003.42(a), 1208.30(g)(2)(ii); OPPM 97-3, p. 6.

Proceedings:

• 8 C.F.R. § 1003.12, *et seq* Immigration Court procedures are specifically inapplicable: "The sole procedures for review of credible fear determinations by IJs are provided for in 1003.42." 8 C.F.R. § 1003.12.

• IJ "shall determine whether the review shall be in person, or through telephonic or video connection." 8 C.F.R. § 1003.42(c).

• Closed to the public unless the alien consents on the record or in writing. 8 C.F.R. § 1208.30(g)(2)(iii).

• Hearing is recorded. ICPM ¶ 7.4(d)(iv)(E).

• "A credible fear review is simply a review of the DHS asylum officer's decision." ICPM ¶ 7.4(d)(iv)(E). "Credible fear review proceedings should not be as in depth as a full asylum hearing." OPPM 97-3, p. 9.

Representation:

• DHS representation – regulation is silent.

• Alien representation: "Alien may consult with a person or persons of the alien's choosing prior to review." 8 C.F.R. § 1003.42(c).

- "In the discretion of the IJ, persons consulted may be present during the credible fear review. However, the alien is not represented at the credible fear review. Accordingly, persons acting on the alien's behalf are not entitled to make opening statements, call and question witnesses, conduct cross examinations, object to evidence, or make closing arguments." ICPM ¶ 7.4(d)(iv)(C).

Standard of review:

• 8 C.F.R. § 1003.42(d)

• *De novo* – Immigration Judge is not bound by determination of Asylum Officer.

- Considering credibility of alien's statements in support of claim.
- Is there a "*significant possibility*" that the alien could establish eligibility for asylum or withholding? 8 C.F.R. § 1003.42(d) (emphasis added)
  - "Lower than the "well-founded fear" standard needed to receive asylum [and] intended to separate meritorious claims from clearly non-meritorious claims." H.R. Rep. 104-879, 107 (Jan. 2, 1997).

Evidence:

- The administrative "written record" from DHS. 8 U.S.C. § 235(b)(1)(B)(iii)(II); 8 C.F.R. §§ 1003.42(a), 1208.30(g)(2)(ii); OPPM 97-3, p. 6.
- Additionally, the Immigration Judge "*may receive*" any oral or written statement that is material and relevant to an issue in the review. 8 C.F.R. § 1003.42(c) (emphasis added).
  - Receipt of evidence is in the discretion of the Immigration Judge. ICPM ¶ 7.4(d)(iv)(E).
- Testimony of the alien shall be under oath or affirmation administered by the Immigration Judge. 8 C.F.R. § 1003.42(c).
- The immigration judge takes "into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the immigration judge." 8 C.F.R. § 1003.42(d).

Completion standard:

- The Immigration Judge "shall conclude the review to the maximum extent practicable within 24 hours, but in no case later than 7 days" after the Supervisory Asylum Officer approves the Asylum Officer's negative determination. 8 C.F.R. § 1003.42(e).

Decision:

- If the Immigration Judge finds credible fear, vacate Asylum Officer's determination – DHS files Notice to Appear. 8 C.F.R. § 1208.30(g)(2)(iv)(B).
- If the Immigration Judge finds no credible fear, affirm Asylum Officer's determination & remand to DHS for execution of administrative removal order. 8 C.F.R. § 1208.30(g)(2)(iv)(A).

- “The [DHS], however, may reconsider a negative credible fear finding that has been concurred upon by an immigration judge after providing notice of its reconsideration to the immigration judge.” *Id.*

- USCIS takes the position that it has inherent authority to reconsider any of its decisions, but that there is no right to seek reconsideration of a negative credible fear finding.

• There is no right to appeal the Immigration Judge’s decision to the BIA – it is administratively final. *Id.*

## **REASONABLE FEAR REVIEW**

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### Sources of authority:

- Not mentioned in the INA
- 8 C.F.R. §§ 208.31, 1208.31.
- Immigration Court Practice Manual (ICPM) ¶ 7.4(e)(iv).
  - Note that the Manual was not published pursuant to the rulemaking provisions of the Administrative Procedures Act.
  - The BIA has nevertheless suggested that the ICPM is authoritative. *See Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265 (BIA 2010).

### Applicability:

- Aliens administratively ordered removed pursuant to INA § 238(b) (non-LPR aggravated felons) or whose prior order is being reinstated pursuant to INA § 241(a)(5). 8 C.F.R. § 208.31(a); 1208.31(a).
- DHS found no reasonable fear of persecution or torture.
  - Not a “*reasonable possibility* that he or she would be persecuted . . . or tortured in the country of removal.” 8 C.F.R. §§ 208.31(c), 1208.31(c).
- Alien requested Immigration Judge review. 8 C.F.R. §§ 208.31(f), 1208.31(f).

### Initiation of Proceedings:

- Initiated by filing a *Notice of Referral to Immigration Judge*, Form I-863, with the administrative “record of determination:”
  - the report of Asylum Officer’s interview, including a summary of the material facts,
  - other materials upon which the determination was based, and
  - the Officer’s notes.
- 8 C.F.R. § 1208.31(g); ICPM ¶ 7.4(e)(iv)(D).

Proceedings:

- Unlike Credible Fear Reviews, 8 C.F.R. § 1208.31 provides no special procedural rules for Reasonable Fear Reviews.
  - “Except where specifically stated, the rules in this subpart apply to matters before Immigration Judges, including, but not limited to . . . .” 8 C.F.R. Part 1003, Subpart C, Immigration Court – Rules of Procedures, 8 C.F.R. § 1003.12.
    - In short, in the absence of other specifically applicable procedural rules, the same rules of procedure applicable to INA § 240 removal proceedings apply to Reasonable Fear Reviews (e.g.; representation (§ 1003.16), appearances (§ 1003.17), and continuances (§ 1003.29)).
  - The hearing is recorded. ICPM ¶ 7.4(e)(iv)(E).
  - “A reasonable fear review hearing is not as comprehensive or in-depth as a withholding of removal hearing in removal proceedings. Rather, it is a review of the DHS asylum officer’s decision.” – ICPM ¶ 7.4(e)(iv)(E).

Representation:

- DHS may be represented. 8 C.F.R. § 1003.16(a).
- Alien may be represented by an attorney or other representative at no expense to the government. 8 C.F.R. § 1003.16(b).
  - Note that ICPM ¶ 7.4(e)(iv)(C) provides that alien representation is “subject to the immigration judge’s discretion.”

Standard of review:

- Does the alien have a “reasonable fear” of persecution or torture? 8 C.F.R. § 1208.31(g).
  - “The “reasonable fear” screening standard is the same standard of proof used in asylum eligibility determinations. That is, the alien must show that there is a “*reasonable possibility*” that he or she would be persecuted or tortured in the country of removal.” 64 Fed. Reg. 8485 (emphasis added).
    - Higher than the “significant possibility” standard applicable to credible fear review, reflecting the “significantly higher” “likelihood” standard of proof for withholding of removal applications as compared to the “well-founded fear” standard for asylum. *Id.*

- The bars to Withholding of Removal are not considered. ICPM ¶ 7.4(e)(i).

- 8 C.F.R. Part 1003, Subpart C is silent.

Evidence:

- The administrative “record of determination” from DHS. 8 C.F.R. § 1208.31(g).
- Other “evidence may be introduced at the discretion of the Immigration Judge.” ICPM ¶ 7.4(e)(iv)(E).
  - Note that 8 C.F.R. § 1208.31 is silent regarding the submission of evidence beyond the administrative “record of determination.”
- Testimony of witnesses to be under oath or affirmation. 8 C.F.R. § 1003.34.

Completion standard:

- The review shall be conducted by the Immigration Judge “within 10 days of the filing” of the Notice of Referral. 8 C.F.R. § 1208.31(g).
  - Note that although the ICPM refers to “*statutory* time limits,” reasonable fear reviews are a creation of regulation. ICPM ¶ 7.4(e)(iv)(E) (emphasis added).

Decision:

- If the Immigration Judge finds no reasonable fear, return to DHS for execution of administrative removal order. 8 C.F.R. § 1208.31(g)(1).
  - Provide a brief rationale for your concurrence with the Asylum Officer on the order, i.e.; “no protected ground / no government nexus.”
  - No right to appeal the Immigration Judge’s reasonable fear decision to the BIA – it is administratively final. 8 C.F.R. § 1208.31(g)(1)(iv)(A).
- If the Immigration Judge finds reasonable fear, the alien may apply for Withholding of Removal (the alien is ineligible for Asylum). 8 C.F.R. § 1208.31(g)(2).
  - INA § 241(b)(3) and 8 C.F.R. § 1208.16(d)(2) grounds for mandatory denial apply.
  - The Applicant has the right to appeal an adverse decision on an application for Withholding of Removal to the BIA. 8 C.F.R. § 1208.31(g)(2)(ii).

- Regulation silent regarding DHS reconsideration of Asylum Officer's decision.
  - USCIS takes the position that it has inherent authority to reconsider any of its decisions, but that there is no right to seek reconsideration of a negative reasonable fear finding.

- There is no right to appeal the Immigration Judge's decision to the BIA – the decision is administratively final. *Id.*

- However, at least one Circuit Court of Appeal is accepting Petitions for Review and finding jurisdiction to review an IJ's adverse reasonable fear review. *See, e.g.; Marisol-Ayala v. Sessions*, No. 13-72250 (9<sup>th</sup> Cir. 2017) (IJ abused his discretion in finding no reasonable fear where a protected ground – membership in a particular social group; "family ties" – was "a reason" for extortion); *Andrade-Garcia v. Lynch*, 820 F.3d 1076 (9<sup>th</sup> Cir. 2016) (IJ's negative reasonable fear finding supported by "substantial evidence").

- The 9<sup>th</sup> Circuit has faulted as incorrect an IJ's advisal that there is no right to appeal because an alien can petition the 9<sup>th</sup> Circuit for review of an adverse reasonable fear review, and that such a petition is, "in the normal parlance," an appeal. *Marisol-Ayala v. Sessions*, No. 13-72250 (9<sup>th</sup> Cir. 2017).

## **WITHHOLDING-ONLY PROCEEDINGS**

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### Sources of authority:

- INA §§ 241(b)(3).
- 8 C.F.R. §§ 1208.2(c)(2); 1208.3; 1208.31(g)(2).
- Immigration Court Practice Manual (ICPM) ¶ 7.4(h).
  - Note that the Manual was not published pursuant to the rulemaking provisions of the Administrative Procedures Act.
  - The BIA has nevertheless suggested that the ICPM is authoritative. *See Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265 (BIA 2010).

### Applicability:

- Aliens subject to a reinstated removal order pursuant to INA § 241(a)(5) where an Asylum Officer or Immigration Judge has found a reasonable fear of persecution or torture. 8 C.F.R. §§ 1208.2(c)(2)(i); 1208.31(g)(2).
- Aliens administratively ordered removed pursuant to INA § 238 for having been convicted of an aggravated felony, and where an Asylum Officer has found a reasonable fear of persecution or torture. 8 C.F.R. § 1208.2(c)(2)(ii).

### Initiation of Proceedings:

- Initiated by filing a *Notice of Referral to Immigration Judge*, Form I-863. 8 C.F.R. § 1208.2(c)(2).

### Proceedings:

- “The scope of review . . . shall be limited to a determination of whether the alien is eligible for *withholding* or *deferral* of removal.” 8 C.F.R. § 1208.2(c)(3)(i) (emphasis added).

- Withholding-only proceedings are “conducted in accordance with the same rules of procedure as proceedings conducted under 8 C.F.R. part 1240, subpart A,” except that “all parties are prohibited from raising or considering any other issues, including but not limited to issues of admissibility, deportability, eligibility for waivers, and eligibility for any other form of relief.” 8 C.F.R. § 1208.2(c)(3)(i).

Representation:

- DHS may be represented. 8 C.F.R. § 1003.16(a).
- Alien may be represented by an attorney or other representative at no expense to the government. 8 C.F.R. § 1003.16(b).

Standard of review:

- The same burdens of proof regarding an application for withholding of removal applicable in removal proceedings apply. 8 C.F.R. §§ 1208.2(c)(3)(i); 1240.8(d).

Evidence:

- The same evidentiary rules applicable to removal proceedings apply. 8 C.F.R. §§ 1208.2(c)(3)(i); 1240.7.

Completion standard:

- None

Decision:

- The parties have the same right to appeal as in removal proceedings. 8 C.F.R. §§ 1208.2(c)(3)(i); 1240.15.

## ASYLUM-ONLY PROCEEDINGS

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### Sources of authority:

- INA §§ 208, 241(b)(3).
- 8 C.F.R. §§ 1208.2(c)(1); 1208.5(b)(1)(ii); 1208.30(g)(2)(iv)(C); 1235.8.
- Immigration Court Practice Manual (ICPM) ¶ 7.4(g).

- Note that the Manual was not published pursuant to the rulemaking provisions of the Administrative Procedures Act.

- The BIA has nevertheless suggested that the ICPM is authoritative. *See Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265 (BIA 2010).

### Applicability:

- Stowaways found to have a credible fear of persecution or torture by an immigration officer or Immigration Judge. 8 C.F.R. §§ 1208.2(c)(1)(ii); 1208.30(g)(2)(iv)(C).
- Crewmembers (D Visa applicants) who express a fear of persecution or torture to an immigration officer. 8 C.F.R. §§ 1208.2(c)(1)(i), 1208.5(b)(1)(ii).
- Visa Waiver Program (VWP) applicants for admission and overstays who have expressed a fear of persecution or torture to an immigration officer, or who apply for asylum with DHS. 8 C.F.R. §§ 1208.2(c)(1)(iii); 1208.2(c)(1)(iv).
- Aliens who have applied for or have been admitted with an S Visa who have expressed a fear of persecution or torture to an immigration officer, or who applies for asylum with DHS. 8 C.F.R. § 1208.2(c)(1)(iv).
- Aliens administratively ordered removed by DHS pursuant to INA § 235(c)(1) on security and related grounds, and referred to an Immigration Judge by the DHS regional director. 8 C.F.R. §§ 1208.2(c)(1)(v), 1235.8.

### Initiation of Proceedings:

- Initiated by filing a *Notice of Referral to Immigration Judge*, Form I-863. 8 C.F.R. § 1208.2(c)(1).

Proceedings:

- “The scope of review . . . shall be limited to a determination of whether the alien is eligible for *asylum* or *withholding* or *deferral* of removal, and whether asylum shall be granted in the exercise of discretion.” 8 C.F.R. § 1208.2(c)(3)(i) (emphasis added).

- Asylum-only proceedings are “conducted in accordance with the same rules of procedure as proceedings conducted under 8 C.F.R. part 1240, subpart A,” except that “all parties are prohibited from raising or considering any other issues, including but not limited to issues of admissibility, deportability, eligibility for waivers, and eligibility for any other form of relief.” 8 C.F.R. § 1208.2(c)(3)(i).

Representation:

- DHS may be represented. 8 C.F.R. § 1003.16(a).
- Alien may be represented by an attorney or other representative at no expense to the government. 8 C.F.R. § 1003.16(b).

Standard of review:

- The same burdens of proof regarding applications for asylum or withholding of removal applicable in removal proceedings apply. 8 C.F.R. §§ 1208.2(c)(3)(i); 1240.8(d).

Evidence:

- The same evidentiary rules applicable to removal proceedings apply. 8 C.F.R. §§ 1208.2(c)(3)(i); 1240.7.

Completion standard:

- None

Decision:

- The parties have the same right to appeal as in removal proceedings. 8 C.F.R. §§ 1208.2(c)(3)(i); 1240.15.

## CLAIMED STATUS REVIEW

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### Sources of authority:

- INA § 235(b)(1)(C).
- 8 C.F.R. § 1235.3(b)(5)(iv).
- Interim Operating Policy and Procedure Memorandum (OPPM) 97-3: *Procedures for Credible Fear and Claimed Status Reviews*.
- Immigration Court Practice Manual (ICPM) ¶ 7.4(f).
  - Note that the Manual was not published pursuant to the rulemaking provisions of the Administrative Procedures Act.
  - The BIA has nevertheless suggested that the ICPM is authoritative. *See Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265 (BIA 2010).

### Applicability:

- Aliens found inadmissible by DHS and administratively ordered removed (expedited removal) pursuant to INA § 235(b)(1)(A)(i) who claims to be a United States citizen, to have been lawfully admitted for permanent residence, to have been admitted as a refugee, or to have been granted asylum.
- The DHS has been unable to verify the claimed status.
- Alien makes declaration in a written statement under oath under penalty of perjury.
  - INA § 235(b)(1)(C); 8 C.F.R. § 1235.3(b)(5)(i); OPPM 97-3, p. 4; ICPM ¶ 7.4(f).

### Initiation of Proceedings:

- Initiated by filing a *Notice of Referral to Immigration Judge*, Form I-863, with the alien's sworn statement claiming status as a United States citizen, to having been lawfully admitted as a permanent resident or refugee, or to having been granted asylum.

### Proceedings:

- Unlike Credible Fear Reviews, 8 C.F.R. § 1235.3 provides no special procedural rules for Claimed Status Reviews.

- “Except where specifically stated, the rules in this subpart apply to matters before Immigration Judges, including, but not limited to . . . .” 8 C.F.R. Part 1003, Subpart C, Immigration Court – Rules of Procedures, 8 C.F.R. § 1003.12.

- In short, in the absence of other specifically applicable procedural rules, the same rules of procedures applicable to INA § 240 removal proceedings apply to Claimed Status Reviews (e.g.; representation (§ 1003.16), appearances (§ 1003.17), and continuances (§ 1003.29)).

- The hearing is recorded. ICPM ¶ 7.4(f)(v).
- “Though the claimed status review is limited in nature, claims to status, particularly claims to United States citizenship, can be complicated and may require extensive evidence. Therefore, the Immigration Judge has the discretion to continue proceedings to allow DHS and the person making the claim to collect and submit evidence.” ICPM ¶ 7.4(f)(v).

Representation:

- DHS may be represented. 8 C.F.R. § 1003.16(a).
- Alien may be represented by an attorney or other representative at no expense to the government. 8 C.F.R. § 1003.16(b).

- Note that ICPM ¶ 7.4(f)(iii) provides that the alien “may consult with a person or persons of his or her choosing,” and that “in the discretion of the Immigration Judge” the “persons consulted may be present during the claimed status review;” however, “the individual subject to the review is not represented during the review” and the person consulted is “not entitled to make opening statements, call and question witnesses, conduct cross examinations, object to evidence, or make closing arguments.”

Standard of review:

- The immigration judge “determines” whether the alien has the claimed status. 8 C.F.R. § 1235.3(b)(5)(iv).
- Neither the statute, the regulation, nor the Practice Manual offer any standard of proof.

Evidence:

- “Either party may introduce oral or written statements.” ICPM ¶ 7.4(f)(v).
- Other evidence may be submitted in the discretion of the Immigration Judge. ICPM ¶ 7.4(f)(v).

- Note that both the statute and regulation are silent regarding the submission of evidence.

Completion standard:

- “Although not required by statute or regulation, claimed status review cases (except cases involving claims to United States citizenship) will be heard, to the maximum extent practical, within the same time frame as credible fear review cases (within 24 hours to the extent practicable, but not more than 7 days from the filing of the charging document). OPPM 97-3, p. 4; *accord* ICPM ¶ 7.4(f)(i).

Decision:

- If the claimed status is not verified, “the order issued by the immigration officer will be affirmed and the [DHS] will remove the alien.” 8 C.F.R. § 1235.3(b)(5)(iv).
- If the claimed status is verified, “the Immigration Judge will terminate proceedings and vacate the expedited removal order.” 8 C.F.R. § 1235.3(b)(5)(iv).
  - Note that the Order in CASE is that “the decision of the immigration officer is vacated.”
  - The DHS may thereafter place the alien (but not a verified United States citizen) in removal proceedings. 8 C.F.R. § 1235.3(b)(5)(iv).
- There is no right to appeal the Immigration Judge’s decision (at least not to the BIA). 8 C.F.R. § 1235.3(b)(5)(iv).

## **RESCISSION PROCEEDINGS**

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### **Sources of authority:**

- INA §§ 246(a).
- 8 C.F.R. §§ 1246.1.
- Immigration Court Practice Manual (ICPM) ¶ 7.3.

- Note that the Manual was not published pursuant to the rulemaking provisions of the Administrative Procedures Act.

- The BIA has nevertheless suggested that the ICPM is authoritative. *See Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265 (BIA 2010).

### **Applicability:**

- Aliens who have adjusted status as a lawful permanent resident within the past 5 years, who have subsequently been determined by DHS to not have been eligible for the adjustment of status, and who contest any allegation in the *Notice of Intent to Rescind* or requests a hearing before an Immigration Judge. 8 C.F.R. § 1246.1.

### **Initiation of Proceedings:**

- Initiated by filing the *Notice of Intent to Rescind* and the respondent's *Answer* which either contests or denies any of the allegations, or requests a hearing before an Immigration Judge. 8 C.F.R. § 1246.1.

- The *Notice* and *Answer* are entered as exhibits in the record. 8 C.F.R. § 1246.5(b).

### **Proceedings:**

- “The immigration judge shall have authority to interrogate, examine, and cross-examine the respondent and other witnesses, to present and receive evidence, to determine whether adjustment of status shall be rescinded, to make decisions thereon, including an appropriate order, and to take any other action consistent with applicable provisions of law and regulations as may be appropriate to the disposition of the case. Nothing contained in this part shall be construed to diminish the authority conferred on immigration judges by the Act.” 8 C.F.R. § 1246.4.

- “The immigration judge shall advise the respondent of the nature of the proceeding and the legal authority under which it is conducted; . . . of his or her right to

representation . . . ; that he or she will have a reasonable opportunity to examine and object to the evidence against him or her, to present evidence in his or her own behalf, and to cross-examine witnesses presented by the Government . . . .” 8 C.F.R. § 1246.5(b).

- The immigration judge shall “read the allegations in the notice to the respondent and explain them in nontechnical language . . . .” *Id.*

- “The immigration shall require the respondent to state for the record whether he or she admits or denies the allegations contained in the notice . . . and whether he or she concedes that his or her adjustment of status should be rescinded.” *Id.*

- “If the respondent admits all of the allegations and concedes that the adjustment of status . . . should be rescinded . . . , and the immigration judge is satisfied that no issues of law or fact remain, he or she may determine that rescission as alleged has been established by the respondent’s admissions.” *Id.*

- “The allegations contained in the notice shall be taken as admitted when the respondent, without reasonable cause, fails or refuses to attend or remain in attendance at the hearing.” *Id.*

Representation:

- DHS shall be represented. 8 C.F.R. § 1246.5(a).
- Alien may be represented by an attorney or other representative at no expense to the government. 8 C.F.R. §§ 1240.3; 1246.3; 1246.5(b).

Standard of review:

- “In rescission of adjustment of status, the Government bears the burden of proving ineligibility for adjustment by clear, unequivocal, and convincing evidence.” *Matter of N-M-A-*, 22 I&N Dec. 312, 346 (BIA 1998) (Guendelsberger, J., concurring and dissenting), *citing Waziri v. INS*, 392 F.2d 55 (9th Cir. 1968); *Matter of Suleiman*, 15 I&N Dec. 784 (BIA 1974).

Evidence:

- Both parties have the right to present evidence, including witnesses. 8 C.F.R. §§ 1240.7; 1246.5(a) and (b).

Completion standard:

- None

Decision:

• “The decision of the immigration judge may be oral or written. . . . The order shall direct either that the proceeding be terminated or that the adjustment of status be rescinded.” 8 C.F.R. § 1246.6.

• “The formal enumeration of findings is not required.” *Id.*

• Both parties have the right to appeal the decision to the BIA. 8 C.F.R. § 1246.7

## DEPORTATION AND EXCLUSION PROCEEDINGS

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### Sources of authority:

- Former INA §§ 242B.
- 8 C.F.R. §§ 1240.40, *et seq.*
- Immigration Court Practice Manual (ICPM) ¶ 7.2
  - Note that the Manual was not published pursuant to the rulemaking provisions of the Administrative Procedures Act.
  - The BIA has nevertheless suggested that the ICPM is authoritative. *See Matter of Interiano-Rosa*, 25 I&N Dec. 264, 265 (BIA 2010).

### Applicability:

- Deportation proceedings relate to aliens in the United States who have violated immigration law.
- Exclusion proceedings relate to aliens who arrive at a port of entry and are not admissible to the United States.
- Generally similar to, but beginning with proceedings commenced on April 1, 1997, have been replaced by removal proceedings. ICPM § 7.2(a).
  - However, immigration judges continue to conduct deportation and exclusion proceedings in certain cases that began before April 1, 1997.

### Initiation of Proceedings:

- Deportation and Exclusion proceedings are initiated by the filing of an *Order to Show Cause* and a *Notice to Applicant for Admission Detained for Hearing*, respectively.
  - In Deportation proceedings, hearing notices must be either personally served on the alien or sent by certified mail, at least 14 days prior to the hearing.
  - The *Order to Show Cause* or other notice (including any Form I-261, *Additional Charges of Inadmissibility/Deportability*) must be in English and Spanish. Former INA § 242B(a)(3)(A).

Proceedings:

- The rules of procedure, representation, evidence, appeal, etc. are generally equivalent to those applicable to INA § 240 removal proceedings.
- Exclusion proceedings are closed to the public unless the alien requests that the public be allowed to attend.
- Grounds for deportability are found in former INA § 241.
- Grounds for excludability are found in former INA § 212.

Relief:

- Eligibility for INA § 245 Adjustment of Status, INA § 208 Asylum, INA § 241(b)(3) Withholding of Removal, and relief under the Convention Against Torture are the same as in removal proceedings.
- Aliens in deportation proceedings may be eligible for Suspension of Deportation (similar to Cancellation of Removal in removal proceedings) pursuant to former INA § 244.
- Aliens lawfully admitted for permanent residence may be eligible for waiver pursuant to former INA § 212(c).

## APPENDIX

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- SAMPLE SCRIPT – CREDIBLE FEAR/REASONABLE FEAR REVIEW PROCEEDINGS
- EXAMPLE IJ ORDERS
  - CREDIBLE FEAR REVIEW
  - REASONABLE FEAR REVIEW
  - CLAIMED STATUS REVIEW
- OPPM 97-3, *Procedures for Credible Fear and Claimed Status Reviews*

**SAMPLE SCRIPT – CREDIBLE FEAR REVIEW PROCEEDINGS**

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This is United States Immigration Judge \_\_\_\_\_ sitting in Credible Fear Review proceedings at \_\_\_\_\_ in the matter of \_\_\_\_\_. The date is \_\_\_\_\_.

\_\_\_\_\_ is appearing pro se and the government is represented by Assistant Chief Counsel \_\_\_\_\_/is not represented.

Mr/Ms \_\_\_\_\_, good morning/afternoon. Is \_\_\_\_\_ the language that you speak and understand the best? Are you having any difficulty hearing or understanding the interpreter?

These proceedings are called Credible Fear Review proceedings. I'm going to take a few minutes to explain the nature and purpose of these proceedings, the limitations of these proceedings, and your rights in these proceedings, so please be patient with me while I do that, and then I'll ask how you'd like to proceed.

These proceedings were initiated when the Department of Homeland Security filed a document with the court called a Notice of Referral to Immigration Judge. That document tells me several things. It tells me that the Department of Homeland Security has found you to be inadmissible to the United States and has administratively ordered your removal from this country; that you have expressed a fear that you could be harmed if returned to your home country; that you have had an interview with an Asylum Officer as a result of that expression of fear; and that the Asylum Officer has concluded that you do not have a credible fear of "persecution" or "torture" as those two terms, "persecution" and "torture," are defined by the

immigration law. Your case has been referred to this court pursuant to your request for an independent review of the decision of the Asylum Officer. In essence, you have appealed the Asylum Officer's decision to this court for review.

Have you understood everything I've explained so far?

In conducting my review I will consider the report of your interview with the Asylum Officer as well as any documents that the Asylum Officer considered in making his or her decision. There are only two decisions available to me: I can either agree with the Asylum Officer, or I can disagree with the Asylum Officer. If I agree with the Asylum Officer, conclude that you do not have a credible fear of "persecution" or "torture," again as those two terms are defined by the immigration law, I will affirm the decision of the Asylum Officer and your case will be returned to the Department of Homeland Security and they will affect your removal from the United States. Conversely, if I disagree with the Asylum Officer, find that you do have a credible fear of "persecution" or "torture," I will vacate these proceedings and you will thereafter be placed in different proceedings that will afford you the opportunity to apply for Asylum or Asylum-like relief in the United States. Regardless of which decision I make, either agreeing with the Asylum Officer or disagreeing with the Asylum Officer, my decision is administratively final.

Have you understood everything I've explained so far?

Before we have your hearing you have the right to consult with a person of your choosing. That could be a friend, a family member, or perhaps an attorney. The officer is handing you a list of attorneys and organizations in this area who may agree to consult with you at a reduced

cost. You're free to contact the individuals on that list or find an attorney from anywhere else you like, but regardless of where you found an attorney with whom to consult, you would have to pay for the consultation. The government will not pay for an attorney consultation for you. You also have the right to have your hearing without consulting with anyone, it's up to you.

Have you understood everything I've explained this morning?

Please stand and raise your right hand to be sworn. Do you solemnly swear that the testimony you'll give in these proceedings will be the truth, the whole truth, and nothing but the truth?

Would you like me to postpone your case for a short time so you can consult with someone before we have your hearing?

\*\*\*\*\*

I note that you had an interview with an Asylum Officer on \_\_\_\_\_, is that correct?

I see that the interview was conducted in the \_\_\_\_\_ language utilizing an interpreter, much as we're doing today, is that correct?

Is everything you told the Asylum Officer during the interview true and correct?

\*\*\*\*\*

Based on your testimony and my review of your interview with the Asylum Officer I conclude that \_\_\_\_\_. (If affirming the decision of the Asylum Officer, provide a brief explanation; i.e., the record does not establish persecution based on a protected ground and/or a nexus to government action or inaction.)

## SAMPLE SCRIPT – CREDIBLE FEAR / REASONABLE FEAR REVIEW PROCEEDINGS

This is United States Immigration Judge \_\_\_\_\_  
sitting in **Credible Fear Review** **Reasonable Fear Review** proceedings at  
\_\_\_\_\_ in the matter of \_\_\_\_\_. The date is  
\_\_\_\_\_. \_\_\_\_\_ is appearing pro se  
and the government is represented by Assistant Chief Counsel  
\_\_\_\_\_ /is not represented.

Mr/Ms \_\_\_\_\_, good morning/afternoon. Is  
\_\_\_\_\_ the language that you speak and understand the best?  
Are you having any difficultly hearing or understanding the interpreter?

These proceedings are called **Credible Fear Review** **Reasonable Fear Review** proceedings. I'm going to take a few minutes to explain the nature and purpose of these proceedings, the limitations of these proceedings, and your rights in these proceedings, so please be patient with me while I do that, and then I'll ask how you'd like to proceed.

These proceedings were initiated when the Department of Homeland Security filed a document with the court called a Notice of Referral to Immigration Judge. That document tells me several things.

**Credible Fear Review:** It tells me that that the Department has found you to be inadmissible to the United States and has administratively ordered your removal from this country; that you have expressed a fear that you could be harmed if returned to your home country; that you have had an interview with an Asylum Officer as a result of that expression of fear; and that the Asylum Officer has concluded that you do not have a credible fear of

“persecution” or “torture” as those two terms, “persecution” and “torture,” are defined by the immigration law.

**Reasonable Fear Review:** It tells me that you have previously been ordered removed from the United States and that the Department has reinstated that order of removal, or that you have been convicted of what is called an aggravated felony; that you have expressed a fear that you could be harmed if returned to your home country; that you have had an interview with an Asylum Officer as a result of that expression of fear; and that the Asylum Officer has concluded that you do not have a reasonable fear of “persecution” or “torture” as those two terms, “persecution” and “torture,” are defined by the immigration law.

Your case has been referred to this court pursuant to your request for an independent review of the decision of the Asylum Officer. In essence, you have appealed the Asylum Officer’s decision to this court for review.

Have you understood everything I’ve explained so far?

In conducting my review I will consider the report of your interview with the Asylum Officer as well as any documents that the Asylum Officer considered in making his or her decision. There are only two decisions available to me: I can either agree with the Asylum Officer, or I can disagree with the Asylum Officer.

**Credible Fear Review:** If I agree with the Asylum Officer, conclude that you do not have a credible fear of “persecution” or “torture,” again as those two terms are defined by the immigration law, I will affirm the decision of

the Asylum Officer and your case will be returned to the Department of Homeland Security and they will affect your removal from the United States. Conversely, if I disagree with the Asylum Officer, find that you do have a credible fear of “persecution” or “torture,” I will vacate these proceedings and you will thereafter be placed in different proceedings that will afford you the opportunity to apply for Asylum or Asylum-like relief in the United States.

**Reasonable Fear Review:** If I agree with the Asylum Officer, conclude that you do not have a reasonable fear of “persecution” or “torture,” again as those two terms are defined by the immigration law, I will affirm the decision of the Asylum Officer and your case will be returned to the Department of Homeland Security and they will affect your removal from the United States. Conversely, if I disagree with the Asylum Officer, find that you do have a reasonable fear of “persecution” or “torture,” I will vacate these proceedings and you then be in withholding-only proceedings that will afford you the opportunity to apply for relief from removal based on your fear of harm.

Regardless of which decision I make, either agreeing with the Asylum Officer or disagreeing with the Asylum Officer, my decision is administratively final.

Have you understood everything I’ve explained so far?

**Credible Fear Review:** Before we have your hearing you have the right to consult with a person of your choosing. That could be a friend, a family

member, or perhaps an attorney. The officer is handing you a list of attorneys and organizations in this area who may agree to consult with you at a reduced cost. You're free to contact the individuals on that list or find an attorney from anywhere else you like, but regardless of where you found an attorney with whom to consult, you would have to pay for the consultation. The government will not pay for an attorney consultation for you. You also have the right to have your hearing without consulting with anyone, it's up to you.

**Reasonable Fear Review:** You have the right to be represented in this hearing by an attorney, but at no expense to the government. The officer is handing you a list of attorneys and organizations in this area that may agree to represent you at a reduced cost. You are free to contact the individuals on that list or obtain an attorney from anywhere else you like, but regardless of where you obtain your attorney it would be at your expense – the government will not pay for your attorney.

You also have the right to represent yourself in any hearing, to speak for yourself without an attorney. You do not have to have an attorney if you don't want one. If you exercise this right, you give up the right to be represented by an attorney during that hearing.

If you need additional time to obtain an attorney I can grant you a short continuance. If you do not request a continuance, you are agreeing to have your case heard today, to speak for yourself without an attorney, and to give up the right to have an attorney represent you at today's hearing.

Have you understood everything I've explained this morning?

Please stand and raise your right hand to be sworn. Do you solemnly swear that the testimony you'll give in these proceedings will be the truth, the whole truth, and nothing but the truth?

Would you like me to postpone your case for a short time so you can:

**Credible Fear Review:** consult with someone before we have your hearing?

**Reasonable Fear Review:** hire an attorney to represent you?

\*\*\*\*\*

I note that you had an interview with an Asylum Officer on \_\_\_\_\_, is that correct?

I see that the interview was conducted in the \_\_\_\_\_ language utilizing an interpreter, much as we're doing today, is that correct?

Is everything you told the Asylum Officer during the interview true and correct?

\*\*\*\*\*

Based on your testimony and my review of your interview with the Asylum Officer I conclude that \_\_\_\_\_. (If affirming the decision of the Asylum Officer, provide a brief explanation; i.e., the record does not establish persecution based on a protected ground and/or a nexus to government action or inaction.)

IMMIGRATION COURT  
1705 E. HANNA RD.  
ELOY, AZ 85131

In the Matter of:

Case No:

\_\_\_\_\_  
Respondent

IN: CREDIBLE FEAR REVIEW PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

On Oct 22, 2015 at 08:30 A.M. a review of the DHS Credible Fear Determination was held in the matter noted above. Testimony [ ] was [ ] was not taken regarding the background of the Applicant and the Applicant's fear of returning to his/her country of origin or last habitual residence.

After consideration of the evidence, the Court finds that the Applicant [ ] has [ ] has not established a significant possibility that he/she would be persecuted on the basis of his/her race, religion, nationality, membership in a particular social group, or because of his/her political opinion.

ORDER: It is hereby ordered that the decision of the immigration officer is:

[ ] Affirmed, and the case is returned to the DHS for removal of the alien.

[ ] Vacated.

This is a final order. There is no appeal available.

DONE and ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

\_\_\_\_\_  
Immigration Judge

CERTIFICATE OF SERVICE  
THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)  
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] ALIEN's ATT/REP [ ] DHS  
DATE: \_\_\_\_\_ BY: COURT STAFF  
Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
IMMIGRATION COURT  
1705 E. HANNA RD.  
ELOY, AZ 85131

In the Matter of:

Case No: A (000-000-000)

(RESPONDENT NAME)

\_\_\_\_\_  
Applicant

IN: REASONABLE FEAR REVIEW PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

On Mar 12, 2018 at 1:00 P.M. a review of the DHS Reasonable Fear Determination was held in the matter noted above. Testimony [ ] was [ ] was not taken regarding the background of the Applicant and the Applicant's fear of returning to his/her country of origin or last habitual residence.

After consideration of the evidence, the Court finds that the alien [ ] has [ ] has not established a reasonable possibility that he/she would be persecuted on the basis of his/her race, religion, nationality, membership in a particular social group, or his/her political opinion, or a reasonable possibility that he/she would be tortured in the country of removal.

ORDER:

[ ] The Court concurs in the DHS Reasonable Fear Determination because:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Additional reasoning [ ] is [ ] is not continued on a separate sheet.

The case is returned to the DHS for removal of the alien. This is a final order. Pursuant to 8 C.F.R. § 1208.31(g)(1), no administrative appeal is available. However, you may file a petition for review within 30 days with the appropriate Circuit Court of Appeals to appeal this decision pursuant to 8 U.S.C. § 1252; INA § 242.

[ ] The Court vacates the decision of the immigration officer. Pursuant to 8 C.F.R. § 1208.31(g)(2), the alien is hereby placed in "withholding-only" proceedings.

DONE and ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_.  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Richard A. Phelps  
Immigration Judge

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CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY:  MAIL [M]  PERSONAL SERVICE [P]  
TO:  ALIEN  ALIEN c/o Custodial Officer  ALIEN's ATT/REP  DHS  
DATE:  BY: COURT STAFF

Attachments:  EOIR-33  EOIR-28  Legal Services List  Other

---

IMMIGRATION COURT  
1705 E. HANNA RD.  
ELOY, AZ 85131

In the Matter of: Case No.

In: Claimed Status Review Proceedings

ORDER OF THE IMMIGRATION JUDGE

On \_\_\_\_\_ at \_\_\_\_\_ AM/PM, the applicant's Claimed Status was reviewed in the matter noted above. This applicant claimed the following status:

[ ] LPR      [ ] Asylee      [ ] Refugee      [ ] U.S. Citizen

After consideration of the evidence, the Court finds that the Applicant [ ] has [ ] has not established the claimed status.

ORDER: It is hereby ordered that the decision of the immigration officer is:

[ ] Affirmed, and the case is returned to DHS for removal of the alien.  
[ ] Vacated.

This is a final order. There is no appeal available.

DONE and ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_.  
  

---

## Immigration Judge

**CERTIFICATE OF SERVICE**

THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)  
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [ ] ALIEN's ATT/REP [ ] DHS  
DATE: \_\_\_\_\_ BY: COURT STAFF  
Attachments: [ ] EOIR-33 [ ] EOIR-28 [ ] Legal Services List [ ] Other



United States Department of Justice  
Executive Office for Immigration Review  
*Office of the Chief Immigration Judge*

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Chief Immigration Judge

5107 Leesburg Pike, Suite 2545  
Falls Church, Virginia 22041

**MEMORANDUM TO:** All Assistant Chief Immigration Judges  
All Immigration Judges  
All Court Administrators  
All Support Staff

**FROM:** The Office of the Chief Immigration Judge

**SUBJECT:** Interim Operating Policy and Procedure  
Memorandum 97-3: Procedures for Credible  
Fear and Claimed Status Reviews

**TABLE OF CONTENTS**

<u>Page</u>	<u>Subject</u>	
I.	INTRODUCTION	2
II.	CASE SCHEDULING	3
III. 4	FILING OF CHARGING DOCUMENT	
IV. 6	CREATION OF RECORD OF PROCEEDING	
V. 7	NOTICE OF THE PROCEEDING	
VI.	CONDUCT OF THE PROCEEDING	7
VII. 8	IMMIGRATION JUDGE'S ORDER	



## I. INTRODUCTION

Section 235(b)(1) of the Immigration and Nationality Act (INA)<sup>1</sup> provides for expedited removal of certain inadmissible aliens. Specifically, those arriving aliens deemed inadmissible to the United States pursuant to INA sections 212(a)(6)(C) (fraud or misrepresentation) or 212(a)(7) (lack of proper documents) shall be ordered removed from the United States by an officer of the Immigration and Naturalization Service (INS) without referral for a hearing before an Immigration Judge.<sup>2</sup> Even in the expedited removal process, however, there are two procedures that will permit such cases to be docketed with the Immigration Court - credible fear and claimed status reviews.

### A. CREDIBLE FEAR REVIEW

The first procedure relates to review of credible fear determinations. The credible fear standard is defined as "a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under section 208." INA section 235(b)(1)(B)(v). In addition, the regulations make it clear that the Immigration Judge's review is a de novo review of the INS's credible fear determination. 8 C. F. R. section 3.42(d).

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<sup>1</sup> All references to the INA are to that statute, as amended, including amendments made by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), enacted as Division C of the Departments of Commerce, Justice, and State, and the Judiciary Appropriations Act for 1997, Pub. L. No. 104-208, 110 Stat. 3009 (September 30, 1996).

<sup>2</sup> There are certain exceptions. For example, stowaways are ineligible to apply for admission under INA section 235(a)(2) and 8 C. F. R. section 235.1(d)(4), and Cubans who arrive by air at a port of entry in accordance with INA section 235(b)(1)(F) and 8 C. F. R. section 235.3(b)(1)(i), are not processed through expedited removal. In addition, a special process exists for aliens removable under INA section 235(c) where the immigration officer or Immigration Judge suspects that the alien is inadmissible under INA section 212(a)(3)(A)(i)(I) or (A)(iii) (Security related grounds). 8 C. F. R. section 235.8.

If an alien in expedited removal expresses a fear of persecution, or an intention to apply for asylum, that alien will be referred to an INS officer for a credible fear determination. If the INS officer determines that the alien has not established a credible fear of persecution (and an INS supervisor concurs), the alien may request review of that determination by an Immigration Judge on the INS Record of Negative Credible Fear Finding and Request for Review by Immigration Judge (INS Form I-869). That review must be "concluded as expeditiously as possible, to the maximum extent practicable within 24 hours, but in no event later than 7 days after the date of the determination [by the supervisory asylum officer] . . . ." INA section 235(b)(1)(B)(iii)(III):

B. CLAIMED STATUS REVIEW

The second procedure permits an alien in expedited removal who claims under oath to be a United States citizen<sup>3</sup>, to have been lawfully admitted for permanent residence, to have been admitted as a refugee, or to have been granted asylum, to obtain review of that claim by an Immigration Judge where INS determines that the alien has no such claim (claimed status review).<sup>4</sup> Although not required by statute or regulation, claimed status review cases (except cases involving claims to United States citizenship)<sup>5</sup> will be heard, to the maximum extent practical, within the same time frame as credible fear review cases (within 24 hours to the extent practicable, but not more than 7 days from the filing of the charging document). See section III entitled "Filing of Charging Document."

II. CASE SCHEDULING - CREDIBLE FEAR AND CLAIMED STATUS

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<sup>3</sup> The interim regulation, effective April 1, 1997, includes claimed status review for aliens who claim under oath to be United States citizens. See 8 C.F.R. section 235.3(b)(5).

<sup>4</sup> See 8 C.F.R. section 235.6(a)(2)(ii).

<sup>5</sup> Claims to United States citizenship are often complex and may require that the alien obtain documentation to support the claim. Nevertheless, these cases will be heard as expeditiously as possible.

## REVIEWS

It is anticipated that the majority of these cases will be heard at established INS detention centers (Service Processing Centers (SPCs) and contract facilities). However, we also anticipate that the INS will detain these aliens at other locations,<sup>6</sup> necessitating courts that do not normally hear detained cases to hear credible fear or claimed status review cases.<sup>7</sup> For the present time, the Immigration Court will not use the Interactive Scheduling System (ISS) to calendar credible fear or claimed status review cases. As that technology becomes more widely implemented, we will revisit this issue.

The Assistant Chief Immigration Judges, in coordination with the Court Administrators, will establish credible fear review calendar time in the Judges' agendas. This will permit dedicated docket time for these cases, in the same way that we established asylum (MA and IA) time in 1995 for expedited asylum cases.

### III. FILING OF CHARGING DOCUMENT

The charging document for credible fear and claimed status review cases is the Notice of Referral to Immigration Judge (Form I-863).<sup>8</sup> This document is considered to be a charging document in accordance with 8 C. F. R. section 3.13, and thus jurisdiction vests with the Immigration Court upon its filing. 8 C. F. R. sections 3.14 and 3.42(a). The INS should file the Form I-863 with the same court that they would file any other charging document. Therefore, base cities with detail sites will accept filings of the Form I-863 in the same manner currently utilized for filing other charging documents. However, because time is of the essence with regard to these expedited cases, and if distance from the

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<sup>6</sup> See 8 C. F. R. section 235.3(e) relating to detention in non-Service facilities.

<sup>7</sup> INA section 235(b)(1)(B)(iii)(IV) provides that an alien in expedited removal "shall be detained pending a final determination of credible fear of persecution . . ." The regulations provide for release on parole for medical emergencies or for a legitimate law enforcement objective. 8 C. F. R. sections 235.3(b)(2)(iii) and (b)(4)(ii) (credible fear review cases); 8 C. F. R. section 235.3(b)(5)(i) (claimed status review cases).

<sup>8</sup> 8 C. F. R. section 235.6(a)(2).

court renders it impractical for the INS to file the Form I-863 and accompanying documents in person, the Court Administrator shall establish a procedure to allow for the filing of these documents by fax. Filing by fax shall be limited only to credible fear and claimed status review cases. The procedure established by the Court Administrator shall be forwarded to the District Directors/Officers-in-Charge; District Counsels/Sector Counsels; and to all INS offices within the jurisdiction of the local immigration court. Such procedure will also include a method for immediate telephonic confirmation by the INS that the Form I-863 filed via fax has been received by the immigration court.

Court Administrators will also establish a system to ensure prompt ANSIR data entry and ROP creation. For example, a separate box could be set aside into which Forms I-863 would be placed, and certain staff could be designated to regularly check, retrieve and create ROPs during the course of each business day for any new filings (i.e., every hour or half hour).

#### A. CREDIBLE FEAR REVIEW

The regulations provide that the INS shall also file the "written record" along with the Form I-863.<sup>8</sup> C. F. R. section 3.42(a). The statute defines the record to include "a summary of the material facts as stated by the applicant, such additional facts (if any) relied upon by the officer, and the officer's analysis of why, in light of such facts, the alien has not established a credible fear of persecution. A copy of the officer's notes shall be attached to the written summary." INA section 235(b)(1)(B)(iii)(II); see also 8 C. F. R. sections 208.30(f) and 235.3(b)(2)(i). Therefore, the Immigration Court should receive the Form I-863; the Record of Sworn Statement in Proceedings Under Section 235(b)(1) of the Act (Form I-867AB); the Notice and Order of Expedited Removal (Form I-860);<sup>9</sup> the Record of Negative Credible Fear Finding and Request for Review by Immigration Judge (Form I-869); the Record of Determination/Credible Fear Worksheet (INS APSO Form E), and any other materials, such as the INS officer's notes, that are filed with the Form I-863.

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<sup>9</sup> The alien signs the reverse of this form acknowledging receipt.

**B. CLAIMED STATUS REVIEW**

In claimed status review cases, the INS will file with the court, the Form I-863 and the expedited order of removal (Form I-860) issued by the immigration officer. 8 C. F. R. section 235.3 (b)(5). No other documents are required to be filed by the INS.

**IV. CREATION OF THE RECORD OF PROCEEDING**

A Record of Proceeding (ROP) will be created for each credible fear and claimed status review case. ROPs for these cases will be RED in color. Court Administrators must ensure that ROPs are created expeditiously. The goal should be to have the ROP created within 2 hours of having received the charging document. A tape envelope shall be included in each ROP.

Both credible fear and claimed status review case ROPs should be set up such that the left side of the ROP will contain the Immigration Judge worksheet (administrative side) and the right side should contain the Form I-863, any submissions filed along with the Form I-863, any written hearing notice(s) and the tape envelope. Tapes and ROP labeling should be done according to the Uniform Docketing System Manual.

**A. CREDIBLE FEAR REVIEW**

The regulations provide that the ROP in credible fear review cases shall NOT be merged with any later proceeding involving the same alien. 8 C. F. R. section 3.42(b). Once the hearing is completed, the ROP can be retired, utilizing the same procedure as with any other ROP retirement.

**B. CLAIMED STATUS REVIEW**

If the Immigration Judge determines that the alien has no claim to status and thus affirms the expedited removal order of the immigration officer, the ROP should be filed with the closed record files and retired according to the Uniform Docketing Manual. However, if the Immigration Judge finds that the alien has established a claim to status, the order of the immigration officer will be vacated and proceedings will be terminated. In this instance, the INS can elect to place the alien in proceedings under section 240 of the INA. 8 C. F. R. 235.3(b)(5)(ii). Should the alien be placed in 240

**proceedings, the claimed status ROP should be merged with the ROP created for the 240 proceedings.**

V. NOTICE OF THE PROCEEDING - CREDIBLE FEAR AND CLAIMED STATUS REVIEWS

Special hearing notices have been created in ANSIR for these cases. For credible fear review cases, the hearing notice is entitled "Notice of Review of Credible Fear Determination." For claimed status review cases, the hearing notice is entitled "Notice of Review of Claimed Status."

These hearing notices should be served in person, if practicable. If in-person service is not practicable, then the hearing notice must be sent to the alien in care of his or her custodial authority by an appropriate overnight courier. Due to the expedited nature of the proceedings, we should attempt to serve the hearing notice within 24 hours of receiving the Form I-863.

VI. CONDUCT OF THE PROCEEDING - CREDIBLE FEAR AND CLAIMED STATUS REVIEWS

The regulations provide that "credible fear determinations may be reviewed by the Immigration Judge by telephone conference call without the consent of the alien." 8 C. F. R. section 3.25(c). Therefore, it is anticipated that where the alien is detained at a location remote from an immigration court, credible fear reviews will be conducted by telephone conference. Additionally, those courts equipped with video teleconferencing equipment may use it to conduct the proceedings. However, where aliens are detained at the same location as the Immigration Court (SPCs, contract facilities), the review may proceed in person.

The Immigration Judge must tape record the review. Although the tape will not normally be transcribed, the tape will remain in the ROP.

The Immigration Judge may "receive into evidence any oral or written statement which is material and relevant to any issue in the review." 8 C. F. R. section 3.42(c). This regulatory provision must be interpreted in harmony with the fact that the credible fear review, as well as claimed status review proceedings takes place within the context of expedited removal, however at the same time the court is responsible for ensuring that due process is maintained.

Credible fear review proceedings should not be as in-depth as a full asylum hearing. All requests for continuance must be considered in light of the

statutorily-mandated time frames for such review and the fact that these proceedings occur within the context of expedited removal.

If an interpreter is necessary, the Immigration Court shall provide one. 8 C.F.R. section 3.42(c). If there is sufficient advance notice, then a contract interpreter shall be ordered. However, given the expedited nature of these reviews, the AT&T Language Line will be used extensively in both credible fear and claimed status review proceedings. The Court Administrator should contact the AT&T Language Line to alert them of the need for expedited access for these proceedings.

There is no right to representation prior to or during the review, either in the statute or the regulation.<sup>10</sup> However, the alien can consult with a person, which could be an attorney. Should the alien consult with an attorney, there is no need to require submission of a Notice of Entry of Appearance (Form EOIR-28).

## VII. IMMIGRATION JUDGE'S ORDER - CREDIBLE FEAR AND CLAIMED STATUS REVIEWS

For credible fear review cases, the Immigration Judge must complete the Credible Fear worksheet and render a prompt decision. The decision of the Immigration Judge shall be made on the standard order entitled Immigration Judge Decision on Credible Fear Review. If the Immigration Judge finds that the alien has not established a credible fear, or has failed to establish the claimed status, the order of the INS officer will be affirmed and the case remanded to the INS for execution

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<sup>10</sup> The statute provides that “[an alien who is eligible for a [credible fear] interview may consult with a person or persons of the alien’s choosing prior to the interview or any review thereof, according to regulations prescribed by the Attorney General.” INA section 235(b)(1)(B)(iv); 8 C.F.R. section 235.3(b)(4)(ii). The regulations provide that “[t]he alien may consult with a person or persons of the alien’s choosing prior to the review.” 8 C.F.R. section 3.42(c). In the discretion of the Immigration Judge in an individual case, persons with whom the alien consulted may be present at the review. However, nothing in the statute, regulations or this OPPM entitles an attorney to make an opening statement, call and question witnesses, cross examine, object to written evidence, or make a closing argument.

of the expedited removal order.<sup>11</sup> If the Immigration Judge finds that the alien has established a credible fear, or established the claimed status, then the Immigration Judge shall vacate the INS's order (made on Form I-860) and return the case to the INS for further appropriate action.<sup>12</sup> 8 C. F. R. sections 3.42(f) and 208.30(f). There is no appeal from these decisions. Therefore, no Notice of Appeal (Form EOIR-26) shall be given to the alien, and these cases shall not be placed in any call-up system for the filing of appeals subsequent to the decision of the Immigration Judge.

## VIII. ROP FILING AND RETIREMENT

The filing of the ROPs and retirement should be done in conformity with the instructions set forth in the Uniform Docketing Manual. Reference the manual for instructions.

Any questions concerning these procedures should be directed to your Assistant Chief Immigration Judge.

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Michael J. Creppy  
Chief Immigration Judge

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<sup>11</sup> This is the language of 8 C. F. R. section 3.42(f). However, 8 C. F. R. section 208.30(f)(2) provides that “[i]f the Immigration Judge concurs with the determination of the asylum officer that the alien does not have a credible fear of persecution, the case shall be returned to the Service for removal of the alien.” The outcome is the same, and the standard judge’s order will ensure uniformity.

<sup>12</sup> For credible fear cases, the INS shall institute removal proceedings, during which the alien will have the opportunity to apply for asylum. 8 C. F. R. section 3.42(f). For claimed status review cases, the INS may institute removal proceedings (except, obviously, for cases involving U. S. citizens). 8 C. F. R. section 235.3(b)(5)(iv).